

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-214864**DATE:** June 19, 1984**MATTER OF:** Tri-Com, Inc.**DIGEST:**

1. Protester has not shown that the agency acted in bad faith when it selected a competitor for the award; to prove bad faith, the protester must present virtually irrefutable evidence that agency officials acted with a specific and malicious intent to injure the protester.
2. Contracting agency's failure to publish a synopsis in the Commerce Business Daily concerning its proposed purchase of communications equipment under a multiple-award schedule as required by statute did not prejudice the protester because the protester had actual knowledge of the proposed purchase and had an opportunity to compete.
3. In determining whether the contracting agency's justification for purchasing from a higher priced, multiple-award schedule supplier is adequate, the important factor is not when the agency put its reasons into writing, but whether those reasons existed at the time the agency made its decision and whether they do in fact support that decision.
4. The protester has failed to show that the agency's justification for purchasing from the higher priced supplier is clearly unreasonable where the protester's arguments only reflect a disagreement with the agency's technical judgment.
5. Whether the protester is a lower priced supplier of the required equipment is irrelevant where the agency has adequately justified a purchase from a higher priced supplier on technical grounds.

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6. GAO sees no value in recommending that the agency conduct a new purchase, despite the deficiency detected, since the protester engaged in a head-to-head competition with the awardee and the agency concluded that only the awardee's equipment could meet its technical requirements.

Tri-Com, Inc. (Tri-Com), protests the award of delivery order No. S-21384D to the Metraplex Corporation (Metraplex) by the National Aeronautics and Space Administration (NASA). The delivery order is for a calibrator/discriminator system, including interchangeable, compatible modules, for telemetry support of the sounding rocket program at NASA's Wallops Flight Facility (Wallops), Wallops Island, Virginia. The order was issued in the amount of \$195,591.30 to Metraplex under contract NO. GS-00K-8301-S0051, which had been awarded to Metraplex by the General Services Administration (GSA) under Federal Supply Contract Group 58, part IX, Multiple Award Communications Schedule for Communications Equipment.

Tri-Com argues that the Metraplex system was selected because of the personal preference of the NASA engineers responsible for acquiring the needed equipment and not because it was the lowest cost system on the multiple-award schedule that met NASA's technical requirements. In Tri-Com's opinion, the equipment it offers under its own GSA multiple-award contract, GS-00K-8301-S0052, will fulfill NASA's needs at a lower cost. Tri-Com argues that, in issuing the delivery order to Metraplex, NASA has not only violated applicable procurement laws and regulations concerning the use of multiple-award schedules, but is also wasting the taxpayers' money.

We deny the protest.

While Tri-Com's protest was pending in our Office, Tri-Com filed a motion for injunctive relief in the United States District Court for the District of Columbia under Civil Action No. 84-1058. This decision responds to a court request for our opinion on Tri-Com's protest.

NASA is planning to participate in an international project in the winter of 1984-1985 for the launching of sounding rockets from a site in Greenland. Under an international agreement, NASA is responsible for providing total range support for the project. To accomplish this mission, NASA is assembling an entire range in Greenland. Among the many pieces of equipment needed at this range are calibrator/discriminator systems. These systems are needed to perform such functions as payload testing prior to launch, diagnosing and correcting problems, in the event that prelaunch payload anomalies occur, and providing real time data during the flights.

Wallops owns two Metraplex calibrator/discriminator systems purchased during 1983 and is integrating those systems into a telemetry van which will be used in Greenland. Wallops also owns Tri-Com equipment.

On March 13, 1984, while NASA had yet to make a final decision on the order, a Tri-Com salesman making a routine sales call learned for the first time that NASA was contemplating the purchase of a calibrator/discriminator system. The salesman told the NASA engineer that Tri-Com was introducing a new synthesized calibrator and would like to be considered for any order NASA might make. The engineer indicated that he would be interested in evaluating Tri-Com's latest equipment, but did not discuss NASA's specific needs.

During the next 9 days, NASA was evaluating the Metraplex system to make sure that it would be compatible with the Metraplex equipment NASA already owned. On March 22, 1984, a second Tri-Com salesman made a followup telephone call to the NASA engineer and discussed NASA's needs in general terms. It was agreed that the salesman would call back the next day with more information about Tri-Com's synthesized calibrator.

After this telephone conversation, the NASA engineer went to his supervisor and discussed the attributes of both the Tri-Com and the Metraplex equipment. Jointly, they concluded that the Metraplex system was superior to Tri-Com's and lower in cost. Shortly after this meeting, the NASA engineer learned that Metraplex's prices on the

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was proposing that NASA use a less expensive channel selector (the 472B-E at \$230 per unit) rather than the type currently in the NASA inventory (the 472B at \$400 per unit). In the opinion of the NASA personnel, the 472B-E was incompatible with NASA's Tri-Com equipment. If the compatible 472B was substituted for 472B-E (NASA planned to purchase 147 channel selectors in all), then the Tri-Com system was no longer less expensive than the Metraplex system, but more costly.

The NASA technical officials were now convinced that the Metraplex system satisfied NASA's needs at the lowest cost. On the other hand, they believed that it was questionable whether Tri-Com could meet NASA's technical requirements and quite clear that, once the cost of the compatible Tri-Com channel selector was added to the company's proposed package, the Tri-Com system was more expensive than the Metraplex system. Nevertheless, the NASA procurement officials requested that the technical staff prepare a written justification explaining the reasons for placing the order with Metraplex. A NASA engineer prepared this justification and submitted it to the Procurement Office on March 28, 1984. On March 30, the Procurement Office issued the purchase order to Metraplex. Shortly after that, Tri-Com filed its protest with this Office and then its civil action in the United States District Court.

Tri-Com argues that NASA's conduct of this procurement has been not only arbitrary and capricious and in violation of applicable statutes and regulations, but also in bad faith. According to Tri-Com, the NASA engineer and his immediate superiors have a personal preference for the Metraplex equipment and conducted the procurement in a way to insure that Metraplex was chosen for the award. Tri-Com also maintains that the NASA engineer consistently withheld information from Tri-Com and tried to mislead the Tri-Com representatives about the true purpose of NASA's proposed purchase.

Tri-Com further argues that NASA violated Pub. L. No. 98-72, 97 Stat. 403 (1983), which amends section 8(e) of the Small Business Act, when it failed to publish a notice of the proposed purchase in the Commerce Business Daily (CBD). Under Pub. L. No. 98-72, government agencies are required to give small businesses, such as Tri-Com, 30 days' notice of a proposed procurement by publishing a synopsis in the CBD unless the procurement is from a requirements or

similar type contract. As indicated below, Pub. L. No. 98-72 required the purchase in question to be synopsisized in the CBD.

In Tri-Com's opinion, NASA has also violated NASA Procurement Regulation § 5.105-2, 41 C.F.R. § 8-5.105-2 (1982). This regulation requires that any purchase from a multiple-award schedule be made at the lowest delivered price under that schedule unless the procurement office can justify the purchase of a higher priced item. Tri-Com believes that NASA has failed to justify the purchase of what Tri-Com maintains is a higher priced system from Metraplex.

Finally, Tri-Com argues that, in the 1983 purchases from Metraplex, NASA received at least 82 items that were not listed on Metraplex's multiple-award schedule. In Tri-Com's opinion, NASA violated the applicable procurement regulations in allowing this to happen. But more significantly, Tri-Com maintains that for NASA now to receive compatible equipment from Metraplex, the agency will have to accept a considerable number of modules that are not on Metraplex's multiple-award schedule in violation of the procurement regulations. If, on the other hand, NASA accepts only equipment actually listed on Metraplex's schedule, then, according to Tri-Com, NASA will not have the "interchangeability" that it says it needs and which it uses as one of the technical reasons to justify a purchase from Metraplex.

Based on the foregoing, Tri-Com requests that NASA be instructed to cancel its purchase order with Metraplex and conduct a new purchase in full compliance with all applicable statutes and regulations.

In NASA's opinion, Tri-Com's protest is without merit. The agency denies that its personnel in any way consciously misled Tri-Com. According to NASA, the decision to purchase the Metraplex system was based solely on the fact that it was the lowest priced system that met the agency's technical needs. There was no attempt to circumvent the procurement statutes and regulation or to deceive Tri-Com's representatives.

As to whether NASA was required to publish a CBD notice of its intended purchase, NASA's initial argument was that there was no requirement under any law or regulation to synopsisize a proposed purchase under a GSA multiple-award

schedule since the competition that such a synopsis is supposed to help generate was obtained during the initial GSA procurement process. According to NASA, its interpretation was confirmed by GSA personnel.

However, NASA now concedes that Pub. L. No. 98-72 does apply to this situation and, technically, it should have published a synopsis in the CBD. According to NASA, GSA sent the NASA Deputy Assistant Administrator for Procurement a letter dated January 19, 1984, which informed NASA of the need to synopsise the type of purchase under discussion here in order to comply with Pub. L. No. 98-72. NASA Headquarters did not pass this information on to the procurement officials at facilities such as Wallops because of confusion at NASA Headquarters over how to develop a workable policy to implement the statutory requirement. The procurement staff at Wallops did not become aware of this change in interpretation until May 4, 1984, more than a month after they had issued the purchase order.

While admitting that there has been an inadvertent, technical violation of Pub. L. No. 98-72, NASA argues that Tri-Com did not suffer any real prejudice since the company's representatives became aware of NASA's proposed purchase on March 13, 1984, and had sufficient time to make their company's case before NASA selected Metraplex and issued the purchase order on March 30.

In rebuttal to NASA's new position on this issue, Tri-Com maintains that it was prejudiced. It points out that Pub. L. No. 98-72 requires publication of a notice 30 days in advance of a purchase from a multiple-award schedule. Moreover, Tri-Com again emphasizes that NASA failed to provide prompt, accurate information about the purchase so that Tri-Com could make a fully informed proposal in the time allowed.

As to the question of which firm offers the lowest cost system, NASA stands by its conclusion that the Tri-Com 472B-E channel selector is technically unacceptable and that once the cost of the compatible 472B channel selector is added to Tri-Com's offer, Metraplex clearly becomes the best buy.

Since, in its opinion, the Metraplex system is the lowest priced equipment on the schedule, NASA argues that it

was not required to prepare a written justification under NASA Procurement Regulation § 5.105.2 when it decided to buy from Metraplex. NASA points out that it only prepared a written justification as an extra precaution in view of Tri-Com's complaints about NASA's decision. Nevertheless, despite its belief that a written justification is unnecessary, NASA maintains that the written justification that was prepared fully supports the selection of Metraplex on technical grounds, even if the Metraplex equipment were considered to be more expensive than Tri-Com's.

At the outset, we note that there does not appear to be any further dispute that Pub. L. No. 98-72 requires a proposed purchase, such as the one in question here, to be synopsisized in the CBD. NASA has learned that its original position was in error and that a breakdown in the agency's internal lines of communications failed to keep the personnel in the field informed of the change regarding CBD notices.

However, NASA also believes that Tri-Com was not actually prejudiced in any way by the agency's failure to synopsisize the proposed purchase in the CBD. In NASA's opinion, Tri-Com had actual knowledge of the purchase in sufficient time to take whatever steps it deemed necessary to offer its own product as a substitute for Metraplex's. NASA emphasizes that it selected the Metraplex equipment because it satisfied the agency's technical needs and was lower priced as well.

As a general rule, the failure of an agency to synopsisize a procurement in the CBD does not provide a compelling reason to resolicit the procurement unless sufficient competition has not been generated or there is proof that the failure to synopsisize was purposely meant to preclude the protester from competing. See, for example, U.S. Air Tool Co., Inc., B-192401, October 30, 1978, 78-2 CPD 307.

Public Law No. 98-72 amended section 8(e) of the Small Business Act to improve small business access to procurement information and to increase competition. In passing this legislation, Congress was clearly concerned that small businesses were simply not receiving timely, accurate

information through the CBD and, as a result, were unable to compete for the government's business. See generally, H.R. Rep. No. 98-3, 98th Cong., 1st Sess., reprinted in 1983 U.S. Code Cong. & Ad. News 710. To eliminate this problem in the future, Congress directed that, for all proposed competitive and noncompetitive civilian and defense procurement actions of \$10,000 and above (with certain exceptions), a notice must be published in the CBD immediately after the necessity for the procurement is established. Moreover, the agency may not foreclose competition until at least 30 days have elapsed either from the date the solicitation is issued or, in the case of a basic agreement, basic ordering agreement, or similar arrangement, from the date a notice of intent to place an order is published in the CBD.

GSA implemented Pub. L. No. 98-72 in Federal Procurement Regulation (FPR) Temp. Reg. 75, 48 Fed. Reg. 48,462, October 19, 1983. Regarding multiple-award schedule contracts for telecommunications equipment, GSA issued further guidance through Supplement 3 to FPR Temp. Reg. 51 (effective November 9, 1983), which states that a multiple-award schedule contract for telecommunications equipment is not considered to be a requirements or similar type contract. Consequently, multiple-award schedule contracts for telecommunications equipment cannot qualify for the statutory exception to the 30-day CBD notice requirement that Pub. L. No. 98-72 provides for a "requirements or similar contract." It was this information which never passed down from NASA Headquarters to the Wallops procurement office. As a result, the Wallops personnel assumed that the proposed purchase was exempt from Pub. L. No. 98-72 and they therefore made no attempt to publish a CBD notice.

Tri-Com argues that NASA's actions amounted to bad faith and were, in effect, a deliberate attempt to prevent Tri-Com from competing for the proposed purchase order. However, we have held that to prove bad faith, a protester must present virtually irrefutable evidence that agency officials acted with a specific and malicious intent to injure the protester. Ebonex, Inc., B-213023, May 2, 1984, 84-1 CPD _____. We do not believe that Tri-Com has presented that level of evidence here. NASA officials do not appear to have deliberately set out to prevent an award to Tri-Com; rather, they believed that they were conducting the purchase in a proper manner. The fact that the purchase was

not conducted in such a manner appears from the record to be due to administrative error rather than to "a specific and malicious intent to injure the protester." We conclude, therefore, that NASA did not act in bad faith when it failed to publish the required CBD notice.

We also find that NASA's failure to publish a CBD notice did not prejudice Tri-Com. The record indicates that Tri-Com would have offered the exact same equipment regardless of the amount of time it had to prepare its proposal. Tri-Com had an opportunity to participate in the purchase process, although admittedly under a timeframe shorter than the 30 days required, and its proposed equipment package was rejected because it did not meet NASA's technical needs, not because it was somehow incomplete due to a lack of time to prepare it. While in the future NASA will be required to synopsize similar purchases in the CBD, NASA's failure to do so in this case was not a critical factor in the agency's ultimate decision to purchase the equipment from Metraplex.

As noted above, Tri-Com has challenged NASA's technical conclusions. In Tri-Com's opinion, NASA's written justification is full of errors and provides no support for the agency's decision to purchase the equipment from Metraplex.

Our Office has consistently held that the contracting agencies are responsible for determining their needs and the best methods of accommodating those needs. Datagraphix, Inc., B-207055, August 16, 1982, 82-2 CPD 132. As noted above, once a contracting agency determines its minimum needs in a multiple-award schedule situation, it must purchase from the lowest priced supplier on the schedule, unless it makes an appropriate justification for purchase from a higher priced supplier. NASA Procurement Regulation § 5.105-2. Our Office will not object to a justification for purchase from a higher priced supplier unless it is shown to be clearly unreasonable. Amray, Inc., B-209481, June 6, 1983, 83-1 CPD 608.

Here, Tri-Com has challenged a number of NASA's technical determinations, pointing out that the written justification has what Tri-Com believes are serious errors. Because NASA's technical determinations may not be totally correct, Tri-Com maintains that we should find the agency's justification to be unreasonable. We do not agree. NASA

has produced both in the written justification and during the protest process a number of unchallenged reasons why Metraplex equipment is superior to Tri-Com's. For example, Tri-Com has not refuted NASA's arguments that, in the future, it would be substantially less costly to expand the number of standard IRIG proportional band-width channels using Metraplex discriminators, that only Metraplex allows manual calibrator of the discriminator from the front panel, or that only Metraplex provides the precision of setability that results from the dial-range output available on its equipment. When Tri-Com's specific criticisms are viewed in the context of all the reasons NASA has listed for purchasing Metraplex equipment, they amount to essentially a disagreement with the agency's technical judgment which is not sufficient to show that the justification is objectionable. Olivetti Corporation of America, B-195243, September 21, 1979, 79-2 CPD 212. Therefore, we find that Tri-Com has failed to show that NASA's justification for purchasing from Metraplex is clearly unreasonable, Amray, Inc., supra.

We also find no merit to Tri-Com's argument that, because NASA prepared its technical justification shortly before issuing the purchase order, the agency's determinations should be viewed with suspicion. This situation is analogous to when a contracting agency prepares an inadequate justification for a sole-source procurement at the time the award is made, but had sufficient reasons nevertheless to justify the award. We have held that, under those circumstances, we are only concerned with whether the decision was supportable in light of the circumstances as they existed and not whether the decision was supported at the time it was made. See Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329. Therefore, the validity of NASA's technical determinations does not depend upon when they were put into writing, but whether they existed at the time NASA decided to purchase Metraplex equipment and whether they do in fact support that decision.

In light of our conclusion, it is unnecessary for us to determine whether Tri-Com or Metraplex is, in fact, the lowest priced supplier--in other words, whether Tri-Com's less expensive 472B-E channel selector can be substituted for its more expensive 472B. Even if the Tri-Com 472B-E was the lowest priced channel selector on the multiple-award schedule, it would make no difference since, as noted above,

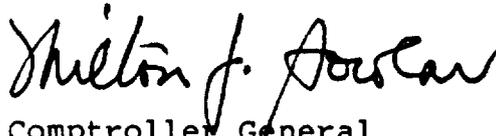
NASA has adequately justified a purchase from Metraplex on technical grounds. Tri-Com has questioned a number of NASA's technical reasons, but has not refuted all of them. Since Tri-Com has not been able to rebut the overall validity of NASA's technical conclusions, the fact that it might be the lowest priced supplier becomes irrelevant under the particular circumstances of this case.

Tri-Com's final argument is that, since NASA received at least 82 items under its 1983 purchases which were not listed on Metraplex's multiple-award schedule, the agency is either going to receive a number of nonschedule items under the current purchase in violation of the applicable procurement regulations or it is going to receive schedule items which will not be interchangeable with its current Metraplex equipment. Whichever occurs, Tri-Com believes that it shows that the NASA purchase is fundamentally defective and should be canceled.

According to NASA and Metraplex, the agency has not received nonschedule items in the past nor will it receive any nonschedule items under the current purchase. Metraplex states that the schedule in effect at the time of this procurement does not list every version of its basic models. If it did, there would be 850 items on its multiple-award schedule, and this would prove extremely confusing to potential purchasers. Since 1974 and up to the time of this procurement, Metraplex has only listed the basic model numbers on the schedule. The users rely on Metraplex to select the proper version of the basic models which will meet the users' needs. This is what Metraplex did for NASA in 1983. In other words, Metraplex shipped items to NASA that were identified by a basic model number plus number or letter suffixes which identified the specific version that NASA needed. According to Metraplex, the price quoted on the schedule for the basic model is the price for all the versions of that model as well. Metraplex notes that Tri-Com and other manufacturers also identify versions of their basic models by number or letter suffixes and sees no difference in what it is doing.

We find that it is irrelevant whether all of Metraplex's model versions were listed on its multiple-award schedule. In reality, Metraplex and Tri-Com engaged in a head-to-head competition, and Metraplex was determined to be technically superior. While this protest has revealed that

NASA was incorrect when it failed to synopsise the purchase, there is no indication that, had the purchase been conducted in strict accordance with all applicable procurement laws and regulations, the result would have been different. NASA has found that Metraplex equipment meets its technical requirements and that Tri-Com's does not. Accordingly, we see no value in recommending that NASA conduct a new purchase, since it has reasonably substantiated its decision that only Metraplex can meet its needs.

for 
Comptroller General
of the United States